

*United States Court of Appeals
for the Second Circuit*



**PETITION FOR
REHEARING
EN BANC**

76-4054

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RCA GLOBAL COMMUNICATIONS, INC.,)
Petitioner,)
)
v.) No. 76-4054
)
FEDERAL COMMUNICATIONS COMMISSION)
and UNITED STATES OF AMERICA,)
Respondents,)
)
ITT WORLD COMMUNICATIONS, INC., et al.,)
Intervenors.)

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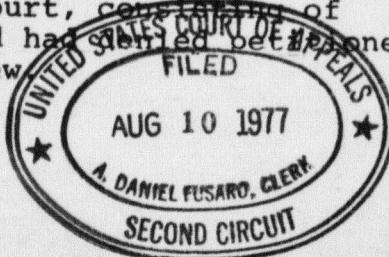
PETITION OF THE FEDERAL COMMUNICATIONS COMMISSION
FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Respondent Federal Communications Commission (FCC) hereby petitions the Court for rehearing of the above-captioned case pursuant to Rule 40(a) of the Federal Rules of Appellate Procedure. ^{1/} Rehearing is necessary, and en banc rehearing is respectfully suggested, because the Court's opinion misapprehends basic facts of the case, requires the agency's action to meet a novel and improper standard of review, and conflicts with Supreme Court precedent establishing the authority of federal agencies to adopt "interim" orders.

Statement Of Facts

The telegraph industry in this country consists of one domestic carrier (Western Union Telegraph Co. or "WU"), and several competing international record carriers (IRCs,

1/ The Court's decision was released on July 27, 1977 in an opinion by Judge Moore joined by Judge Gurfein, with a separate concurring opinion by Judge Feinberg. Previously, on October 19, 1976, another panel of the Court, consisting of Judges Oakes, Timbers and Van Graafeiland had denied petitioner's motion for stay of the orders under review.



primarily the petitioner and intervenors in this case).

Telegrams destined for foreign points are usually filed with WU which then distributes them to the IRCs for over-
^{2/} seas transmission. About 3,000,000 international telegrams are posted with WU each year generating approximately \$7,000,000 in annual revenues. About a fourth of these messages are routed to a specific IRC at the request of the customer. The remaining "unrouted" three-fourths are distributed according to the "international formula," under authority of Section 222 of the Communications Act, 47 U.S.C. 222.

Section 222 was added to the Communications Act in 1943 to permit the merger of the only two carriers then engaged in domestic telegraph service, Western Union Telegraph Co. (WU) and Postal Telegraph Cable Co. Subsection (e), 47 U.S.C. 222(e), was included to insure that the newly merged company could not favor its own international operations, and therefore it required creation of an FCC approved formula which would insure an equitable distribution of outbound international telegrams among the IRCs. A formula was established in 1943, and except for minor modifications, that formula remained in effect until the Commission revised it in 1976 in the orders here under review.

^{2/} There are two basic exceptions to this general rule. In five so-called "gateway cities," New York, Washington, New Orleans, Miami and San Francisco, the IRCs are permitted to maintain offices to pick up messages themselves, and customers not in those cities may deliver at their expense their messages to the IRCs in those cities.

Argument

Section 222(e)(3), 47 U.S.C. 222(e)(3)

provides for modifications of the formula:

"(3) Whenever, upon a complaint or upon its own initiative, and after a full hearing, the Commission finds that any such distribution of telegraph traffic among telegraph carriers, or any such division of charges for such traffic, which is being made or which is proposed to be made, is or will be unjust, unreasonable, or inequitable, or not in the public interest, the Commission shall by order prescribe the distribution of such telegraphic traffic, or the division of charges therefor, which will be just, reasonable, equitable, and in the public interest, and will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers." (Emphasis added).

The statute's use of the disjunctive "or" shows that the formula may be modified for any one of four distinct reasons, if it proves to be "unjust, unreasonable, or inequitable, or not in the public interest," provided of course that the modified formula meets all four tests. It is fairly clear that the old formula does fail all four of these tests, and the Court does not take issue with the Commission's findings in this regard. The 1943 formula was supposed to preserve a proportionate distribution of traffic to most, if not all, destinations, so that each IRC could keep as much traffic as it had prior to the merger. Each carrier was to receive a quota of messages to each area served, and if a carrier exceeded its quota one month, fewer messages

would be distributed to it thereafter to maintain the area balance.

However, the Commission found that since 1943 the IRCS had expanded their gateway - originated traffic with the result that the formula operated in many areas to give all the unrouted traffic to one or another carrier. In fact the situation had deteriorated to the point that 85% of the total unrouted traffic was no longer distributed proportionately as the formula intended, but those carriers least successful in attracting traffic were being rewarded with all the unrouted traffic.

The unreasonableness and inequity of such a situation is obvious. The adverse effect upon the public interest is also clear. In 1943 the Commission had allayed concerns that the formula might limit the public interest benefits derived from competition in the international market by finding that the formula "continues and even promotes reasonable competition," and it promised to "maintain careful surveillance over the operations of the international telegraph carriers to assure that progress in providing efficient and economical service in this field will continue." Application for Merger Western Union and Postal Telegraph, 10 FCC, 184, 1975 (1943). By awarding the unrouted traffic to the carriers who were least successful in attracting traffic on their own, the formula had lost any

stimulus to improve service, increase efficiency, or reduce charges. This tendency, the Commission found, was "injurious to the public interest and should be eliminated." (J.A. 17).

The Commission did eliminate this problem by adopting the formula now under review. However, the Court vacated the new formula because of statements by the Commission that it intended ultimately to move toward a method whereby customers would be required to specify which IRC was to carry the message (the "all-routed" method). The Court misunderstood those statements as indicating that the new formula would not be justified absent a link with the all-routed proposal. This misunderstanding of the facts obstructed the Court from viewing the new formula on the basis of its own merits, separate and apart from the all-routed proposal.

While the Commission did tentatively agree to proceed in the direction of an all-routed system, it was well aware that it did not have sufficient facts before it to determine whether such a method would be feasible or would be the one which would best serve the public interest. Thus, at the conclusion of its Report and Order (J.A. 35) it stated:

Meanwhile, we are soliciting prompt comments concerning the operational, economic, and legal implications of an all-routed distribution in order that we may reach an early decision concerning whether the public interest would be served even better through this means.

The Commission adopted the new formula on the basis of its own merits, quite apart from the all-routed idea. Thus, while the Court correctly observed that the Commission had not resolved "questions concerning possible operational, economic and legal implications," Slip Op. at 20 (quoting J.A. 35), with regard to the all-routed proposal, we respectfully submit that the Court erred by assuming that these questions had also not been resolved with regard to the formula under review.

All of the operational details were discussed in depth in the Order, and the formula itself which included details of implementation was attached as an appendix (J.A. 45). The operational implications were so well worked out that the new formula has been operating without incident these last nine months. The economic implications were a primary topic of discussion. For example, charts and discussion by the Commission, (J.A. 12-14) showed precisely the breakdown of traffic under the 1943 formula. With regard to RCA, the charts show that it was getting 48.2% of the unrouted traffic under the old formula, but that under the new formula it would receive only 33.1% unless it improved its competitive position. The Commission even analyzed RCA's worst case statements of revenue shift which might be caused by the new formula, and determined that it would amount to 6.3% of RCA's net income (J.A. 75, a loss which the Commission believed would not outweigh the public

benefits to be achieved. The Commission also devoted extensive discussion to its legal authority to adopt and enforce the new formula in both the Report and Order and the Reconsideration Order, and determined that it was proceeding properly. See for example, J.A. 71-75.

The court does not focus on the Commission's findings that the interim formula will be "just, reasonable, [and] equitable," but instead states that the Commission does not present "any proof that the public interest will be served by the Commission's new interim plan." Slip Op. at 21 (emphasis added). By this statement and other references to requirements of "proof" (Slip Op. pp. 17 and 21) the Court is apparently requiring a federal agency to prove its case before enacting rules. This is error. The proper standard of review for informal rule-making proceedings such as this one, which are conducted under the authority of Section 4 of the Administrative Procedure Act, 5 U.S.C. 553 (1970), is not whether the agency has "proved" the necessity of propriety of the rules, but whether the action is "arbitrary and capricious." ^{3/} This test requires only "a

3/ See Administrative Procedure Act, 5 U.S.C. 706(2)(A)-(D) (1970). The "arbitrary and capricious" test is distinguishable from the more rigorous substantial evidence and *de novo* review standards of 5 U.S.C. 706(2)E and (F). Abbott Laboratories v. Gardner, 387 U.S. 136, 143 (1967). Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413-415 (1971).

rational connection between the facts found and the choice
made,"^{4/} and the burden of proof is on the challenger of
agency regulations to demonstrate that they are "arbitrary
and capricious."^{5/}

The Court's focus upon the all-routed proposal
prevented it from reviewing the reasonableness of the interim
formula. "The basic facts which [led the Commission] to reach
its conclusion of public benefit" from the interim formula^{6/}
are clearly and indisputably laid bare. While international
telegraph services are presently adequate, the Commission found
that the 1943 formula was not aiding in maintaining that

4/ Burlington Truck Lines, Inc. v. United States, 371 U.S. 156,
168 (1962). See also, United States v. Allegheny-Ludlow Steel
Corp., 406 U.S. 747, 749 (1972) for the Supreme Court's inter-
pretation of the arbitrary and capricious standard:

We do not weigh the evidence introduced
before the Commission; we do not inquire
into the wisdom of the regulations that
the Commission promulgates, and we inquire
into the soundness of the reasoning by
which the Commission reaches its conclusions
only to ascertain that the latter are rationally
supported.

5/ American Nursing Home Association v. Cost of Living Council,
497 F.2d 909, 914 (TECA 1974). See also, Angel v. Butz, 487 F.2d
260, 263 (10th Cir. 1973).

6/ Hawaiian Telephone Company v. FCC, 498 F.2d 771 (D.C. Cir.
1974). See Slip Op. at p. 18.

efficiency as it had been intended to do 33 years previously. (J.A. 73). The Commission's years of experience in this area led it to a common-sense judgment that "maintenance of the present service quality and its improvement is more likely where the carriers are required to earn the traffic they receive than where they receive it arbitrarily under a fixed quota." ^{7/} Therefore the Commission fashioned the interim formula so that unrouted traffic was awarded to individual IRCs in proportion to the routed traffic it earned. While there may be reason to question the public benefit of an all-routed proposal, neither the Court nor petitioner has cast any serious doubt upon the validity of the Commission's determination that the interim plan will maintain and promote good service, thus benefiting the public interest.

The possibility that the interim formula might ultimately be replaced by the all-routed proposal if the Commission, after further proceedings, is able to conclude

^{7/} J.A. 73. "In the early days of International telegraphy... there was a vigorous competition which benefited the public in the form of increased service coverage and substantially reduced rates. Today in services such as telex and leased channel there is still a vigorous competition. * * * The charges for message service have not increased substantially, but there has been no stimulus under the present formula to improve service or increase efficiency. In this situation, we believe that the public is ill served by a formula which stifles user choice." (J.A. 26).

that the latter proposal would be in the public interest does not diminish the weight properly to be accorded to the present judgment favoring the interim formula. It is not open to question that the FCC has ample authority to issue "interim" orders pending proceedings to determine whether some other additional action would be more appropriate. Section 4(i) of the Communications Act, 47 U.S.C. 154(i) authorizes the FCC to issue "such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions," and the Supreme Court has held that this encompasses the power to issue interim orders. United States v. Southwestern Cable Co., 392 U.S. 157, 180-181 (1968).

The fact that the Commission is presently considering the adoption of another distribution method does not relieve the Court of its obligation to review the present method on its own merits. American Commercial Lines, Inc., v. Louisville & Nashville Railroad Co. 392 U.S. 571, 590-592 (1968). This independent review is important because if the proposed other method, in this case the all-routed proposal, does not survive the test of further scrutiny, the interim method could well become permanent.

In tying the interim" order here to the all-routed proposal and thereby not considering that order standing alone, the Court's opinion conflicts with Supreme Court precedent

establishing the authority of federal agencies to adopt "interim" orders, and to have those orders stand or fall on their own merits. An early case to this effect was The New England Division Case, 261 U.S. 184 (1923). There the Supreme Court affirmed a "provisional" order of the Interstate Commerce Commission which directed an across-the-board 15% increase in divisions of joint rates paid to several New England railroads. The Court found nothing improper in the action even though the ICC had acknowledged that a thorough revision of the divisional arrangements of the carriers was required to put them upon a "more logical and systematic basis" and had made specific suggestions as to the character of the study to be pursued. Id. at 188 and 200. See also Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575 (1942), and Federal Power Commission v. Tennessee Gas Transmission Co., 371 U.S. 145 (1962).

The effect of the Court's action in this case is to dilute the utility of the interim order approach which has received the Supreme Court's approval. The impact is likely to be felt far beyond the particular factual setting here involved. Therefore, this is a matter which should receive the attention of the entire Court.

Accordingly, the Federal Communications Commission
8/
respectfully requests that this motion be granted.

Respectfully submitted,

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August 10, 1977

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8/ While the Court did not question the Commission's finding that the 1943 formula is unlawful under 47 U.S.C. 222, the order vacating the interim formula has the side effect of reinstating the unlawful 1943 formula. This is not a result which either the Court or the Commission should wish to promulgate. Therefore, in the event the Court remains unconvinced that the interim formula has a sufficient factual basis independent of the all-routed proposal, we would endorse the suggestion in ITT's petition for rehearing that the Court modify its order and remand the case to the Commission for the limited purpose of clarifying this point.

CERTIFICATE OF SERVICE

I, Marian D. Starks, hereby certify that the foregoing "Petition of the Federal Communications Commission For Rehearing And Suggestion For Rehearing En Banc" was served this 10th day of August, 1977, by mailing true copies thereof, to the following persons at the addresses below:

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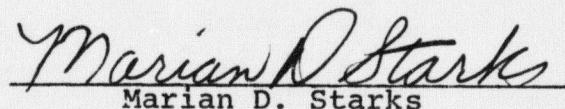
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